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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of Administrative Appeals, MS 2090
Washington, DC 20529-2090



U.S. Citizenship
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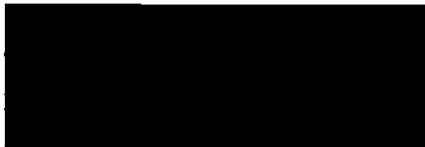
AUG 05 2010

IN RE: Petitioner:
Beneficiary:



Petition: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(L) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(L)

ON BEHALF OF PETITIONER:



INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of \$585. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The Director, Vermont Service Center, denied the nonimmigrant visa petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The AAO will dismiss the appeal.

The petitioner filed this nonimmigrant petition seeking to employ the beneficiary as an L-1A nonimmigrant intracompany transferee pursuant to section 101(a)(15)(L) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(L). The petitioner, a Georgia corporation, states that it intends to engage in the wholesale of crafts and gifts. It claims to be a subsidiary of Raj International Exports, located in Ahmedabad, India. The petitioner seeks to employ the beneficiary as the manager of its new office in the United States for a period of one year.

The director denied the petition based on two independent and alternative grounds, concluding that the petitioner did not establish: (1) that the beneficiary has been employed by the foreign entity in a primarily managerial or executive capacity; or (2) that the beneficiary will be employed by the U.S. entity in a primarily managerial or executive capacity within one year of the approval of the petition.

The petitioner subsequently filed an appeal. The director declined to treat the appeal as a motion and forwarded the appeal to the AAO for review. On appeal, the petitioner asserts that the petitioner submitted sufficient evidence to establish that the beneficiary has been employed by the foreign entity and will be employed in the United States in a managerial capacity, based on his management of subordinate supervisory employees. Counsel asserts that the director placed undue emphasis on the small size of the foreign and U.S. companies in reaching his conclusions. Counsel submits a lengthy brief in support of the appeal.

To establish eligibility for the L-1 nonimmigrant visa classification, the petitioner must meet the criteria outlined in section 101(a)(15)(L) of the Act. Specifically, a qualifying organization must have employed the beneficiary in a qualifying managerial or executive capacity, or in a specialized knowledge capacity, for one continuous year within three years preceding the beneficiary's application for admission into the United States. In addition, the beneficiary must seek to enter the United States temporarily to continue rendering his or her services to the same employer or a subsidiary or affiliate thereof in a managerial, executive, or specialized knowledge capacity.

The regulation at 8 C.F.R. § 214.2(l)(3) states that an individual petition filed on Form I-129 shall be accompanied by:

- (i) Evidence that the petitioner and the organization which employed or will employ the alien are qualifying organizations as defined in paragraph (l)(1)(ii)(G) of this section.
- (ii) Evidence that the alien will be employed in an executive, managerial, or specialized knowledge capacity, including a detailed description of the services to be performed.

- (iii) Evidence that the alien has at least one continuous year of full-time employment abroad with a qualifying organization within the three years preceding the filing of the petition.
- (iv) Evidence that the alien's prior year of employment abroad was in a position that was managerial, executive or involved specialized knowledge and that the alien's prior education, training, and employment qualifies him/her to perform the intended services in the United States; however, the work in the United States need not be the same work which the alien performed abroad.

The regulation at 8 C.F.R. § 214.2(l)(3)(v) also provides that if the petition indicates that the beneficiary is coming to the United States as a manager or executive to open or be employed in a new office in the United States, the petitioner shall submit evidence that:

- (A) Sufficient physical premises to house the new office have been secured;
- (B) The beneficiary has been employed for one continuous year in the three year period preceding the filing of the petition in an executive or managerial capacity and that the proposed employment involves executive or managerial authority over the new operation; and
- (C) The intended United States operation, within one year of the approval of the petition, will support an executive or managerial position as defined in paragraphs (l)(1)(ii)(B) or (C) of this section, supported by information regarding:
 - (1) The proposed nature of the office describing the scope of the entity, its organizational structure, and its financial goals;
 - (2) The size of the United States investment and the financial ability of the foreign entity to remunerate the beneficiary and to commence doing business in the United States; and
 - (3) The organizational structure of the foreign entity.

The first issue to be addressed is whether the petitioner established that the beneficiary has been employed by the foreign entity in a primarily managerial or executive capacity.

Section 101(a)(44)(A) of the Act, 8 U.S.C. § 1101(a)(44)(A), defines the term "managerial capacity" as an assignment within an organization in which the employee primarily:

- (i) manages the organization, or a department, subdivision, function, or component of the organization;
- (ii) supervises and controls the work of other supervisory, professional, or managerial employees, or manages an essential function within the organization, or a department or subdivision of the organization;
- (iii) if another employee or other employees are directly supervised, has the authority to hire and fire or recommend those as well as other personnel actions (such as promotion and leave authorization), or if no other employee is directly supervised, functions at a senior level within the organizational hierarchy or with respect to the function managed; and
- (iv) exercises discretion over the day-to-day operations of the activity or function for which the employee has authority. A first-line supervisor is not considered to be acting in a managerial capacity merely by virtue of the supervisor's supervisory duties unless the employees supervised are professional.

Section 101(a)(44)(B) of the Act, 8 U.S.C. § 1101(a)(44)(B), defines the term "executive capacity" as an assignment within an organization in which the employee primarily:

- (i) directs the management of the organization or a major component or function of the organization;
- (ii) establishes the goals and policies of the organization, component, or function;
- (iii) exercises wide latitude in discretionary decision-making; and
- (iv) receives only general supervision or direction from higher-level executives, the board of directors, or stockholders of the organization.

In a letter dated December 19, 2008, the petitioner described the beneficiary's duties with the foreign entity as follows:

The Beneficiary has been employed as the proprietor and manager at the Indian Subsidiary from [M]ay 2005 until the present time. As a Manager, the Beneficiary is responsible for overall supervision of all functions of the business including but not limited to budgeting, customer relations, financial planning, business development and expansion.

On the Form I-129, Petition for a Nonimmigrant Worker, the petitioner stated that the beneficiary currently performs the following duties:

Management of three departments (Sales, Purchase and Accounting). Development of market analysis, marketing strategy, merchandise pricing, business development. Hiring and firing, training and supervision of employees.

The petitioner submitted an organizational chart for the foreign entity, which indicates that the proprietor/manager supervises a sales manager, a purchase manager, and an accountant. The chart shows that the sales manager supervises two salesmen and the purchase manager supervises a technician. None of the employees are identified by name.

The director issued a request for additional evidence ("RFE") on January 2, 2009, in which he requested the following evidence to establish that the beneficiary has been employed by the foreign entity in a primarily managerial or executive capacity: (1) a description of the typical managerial responsibilities the beneficiary performs, along with documentary evidence of managerial decisions he has made in his capacity as manager; (2) an organizational chart and a list of the foreign employees that are supervised by the beneficiary, identifying each employee's position title, a description of their job duties, and the minimal education and experience requirements for the position; and (3) evidence of wages paid to each employee of the overseas office.

In a response dated February 26, 2009, counsel for the petitioner stated that the beneficiary performs the following managerial duties in his position as manager and sole proprietor of the foreign entity:

- Ultimate supervisory control of all employees including Sales Manager, Purchase Manager, and Accountant.
- Supervise and monitor the team and hire and fire employees.
- Manage the organization and all its departments, including the Sales department and the Purchase department.
- Exercise discretion in the day to day operational running of the business
- Evaluating employees under his supervision by holding annual reviews of employees where he discusses their goals, performance and achievements for the preceding year.
- Corresponding with departments for carrying out the operations of the Company.
- Receiving latest updates on functioning of different departments and resolving issues.
- Reviewing Budgets, Financial Reports and other financial documents provided by the employees.
- Keeping track of achieving the company's goals.
- Attending and presiding over meetings and overseeing the functioning and development of the business.
- Judgment and Decision Making by considering the relative costs and benefits of potential actions to choose the most appropriate one.
- Management of Personnel Resources by motivating, developing, and directing people as they work, identifying the best people for the job.

- Making managerial and business decisions and solving problems to choose the best solutions.

In response to the director's request for examples and evidence of the beneficiary's managerial decision, counsel stated that the beneficiary "constantly evaluates employees' performances and attitude and determines if they are suitable for his business," made the managerial decision to expand the business to the United States, and makes decisions regarding which products to purchase for wholesale and retail.

The petitioner also provided the following brief position descriptions for the foreign employees, and noted that four of the employees have earned a Bachelor's degree:

Sales Manager

- Selling and marketing to persons outside the organization.
- Representing the organization to customers, public, government and other external sources.
- Convincing customers to buy merchandise/goods.

Purchase Manager

- Order and maintain inventory
- Stock and promote high demand items.
- Maintain business records.

Accountant

- Maintain books and accounts

Salesmen (2)

- Manage regions to sell to potential customers

Technician

- Verify and stock inventory, shelf, check for physical/liquid damage, maintain cleanliness and support duties.

The petitioner indicated the educational level for four of the employees as a Bachelor's degree.

The director denied the petition on March 16, 2009, concluding that the petitioner failed to establish that the beneficiary has been employed by the foreign entity in a primarily managerial or executive capacity. The director acknowledged the position descriptions submitted, but found that, given the limited number of employees, the claim that the beneficiary is managing "departments," was not supported. The director further found that none of the subordinate personnel appeared to be engaged in managerial, professional or supervisory duties, notwithstanding the job titles assigned to the purchase manager and sales manager.

On appeal, counsel for the petitioner asserts that "there does not appear to be any statute or regulation requiring that the overseas company be of a certain size in order to start a new office in the United States." Counsel notes that "a person may be a 'Manager' even if the size of the company is of eight persons and each department comprises of three to four employees." Counsel asserts that, although the foreign entity has only six employees in addition to the beneficiary, the beneficiary chose to structure it as a hierarchy and "has not created layers for purposes of this petition." Counsel acknowledges that the foreign entity's employees, while some hold bachelor's degrees, are not professional personnel. Counsel notes that the purchase manager performs "routine day to day functions in running the company."

When examining the proposed executive or managerial capacity of the beneficiary, the AAO will look first to the petitioner's description of the proposed job duties. *See* 8 C.F.R. § 214.2(l)(3)(ii). The petitioner's description of the job duties must clearly describe the duties that will be performed by the beneficiary and indicate whether such duties will be either in an executive or managerial capacity. *Id.*

Here, the petitioner's descriptions of the beneficiary's proposed duties are vague and provide little insight into what types of duties the beneficiary has been performing as owner and manager of the foreign entity. For example, the petitioner stated that the beneficiary has been "responsible for overall supervision of all functions," "development of market analysis, marketing strategy, merchandise, pricing, business development," and "hiring, firing, training and supervision of employees." These general statements do not convey an understanding of what the beneficiary has been doing on a day-to-day basis. Specifics are clearly an important indication of whether a beneficiary's duties are primarily executive or managerial in nature, otherwise meeting the definitions would simply be a matter of reiterating the regulations. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d. Cir. 1990).

In response to the director's request for a more detailed description of the beneficiary's duties, the petitioner submitted a lengthy, but overly general and repetitive list of duties which failed to elaborate upon the vague duties previously submitted. For example, the petitioner stated that the beneficiary's duties include "exercise discretion in the day-to-day operational running of the business," "manage the organization and all its departments," "overseeing the functioning and development of the business," "Judgment and Decision-making," and "making managerial and business decisions." With these general statements, the petitioner did little more than indicate that the beneficiary oversees and exercises discretion over the business. Similarly, the petitioner indicates that the beneficiary has "ultimate supervisory control of all employees," "supervise[s] and monitor[s] the team," "evaluates employees under his supervision," and manages personnel resources. Again, the petitioner essentially stated that the beneficiary has the authority to hire and fire subordinate personnel. This description did not provide any additional insight into the beneficiary's actual duties, and, like the previous descriptions, is vague and non-specific in describing the position. Reciting the beneficiary's vague job responsibilities or broadly-cast business objectives is not sufficient; the regulations require a detailed description of the beneficiary's daily job duties. The petitioner has failed to provide any detail or explanation of the beneficiary's activities in the course of his daily routine. The actual duties themselves will reveal the true nature of the employment. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. at 1108.

The definitions of executive and managerial capacity each have two parts. First, the petitioner must show that the beneficiary performs the high-level responsibilities that are specified in the definitions. Second, the petitioner must prove that the beneficiary *primarily* performs these specified responsibilities and does not spend a majority of his or her time on day-to-day functions. *Champion World, Inc. v. INS*, 940 F.2d 1533 (Table), 1991 WL 144470 (9th Cir. July 30, 1991). While the AAO does not doubt that the beneficiary exercised the requisite level of authority over the foreign entity as its owner and manager, the vague position descriptions provided fall significantly short of establishing that the beneficiary's primary duties were managerial or executive in nature. The AAO will not conclude that the beneficiary was employed in a qualifying capacity based on his job title and his ownership of the foreign company. The fact that the beneficiary manages a business, regardless of its size, does not necessarily establish eligibility for classification as an intracompany transferee in a managerial or executive capacity within the meaning of section 101(a)(15)(L) of the Act. *See* 52 Fed. Reg. 5738, 5739 (Feb. 26, 1987). The AAO will not accept a vague job description and speculate as to what specific managerial or executive duties the beneficiary may have performed on a day-to-day basis.

Beyond the required description of the job duties, USCIS reviews the totality of the record when examining the claimed managerial or executive capacity of a beneficiary, including the petitioner's organizational structure, the duties of the beneficiary's subordinate employees, the presence of other employees to relieve the beneficiary from performing operational duties, the nature of the petitioner's business, and any other factors that will contribute to a complete understanding of a beneficiary's actual duties and role in a business.

The statutory definition of "managerial capacity" allows for both "personnel managers" and "function managers." *See* section 101(a)(44)(A)(i) and (ii) of the Act, 8 U.S.C. § 1101(a)(44)(A)(i) and (ii). Personnel managers are required to primarily supervise and control the work of other supervisory, professional, or managerial employees. Contrary to the common understanding of the word "manager," the statute plainly states that a "first line supervisor is not considered to be acting in a managerial capacity merely by virtue of the supervisor's supervisory duties unless the employees supervised are professional." Section 101(a)(44)(A)(iv) of the Act; 8 C.F.R. § 214.2(l)(1)(ii)(B)(2). If a beneficiary directly supervises other employees, the beneficiary must also have the authority to hire and fire those employees, or recommend those actions, and take other personnel actions. 8 C.F.R. § 214.2(l)(1)(ii)(B)(3).

Although the petitioner indicates that the beneficiary supervised a sales manager, a purchase manager, and an accountant, the petitioner has not established that any of these employees was employed in a managerial, supervisory or professional capacity. Counsel acknowledges that none of these employees are professionals performing duties requiring completion of a bachelor's degree. Notwithstanding the job titles assigned to the sales manager and purchase manager, the job descriptions submitted for these employees indicates that they are directly performing sales, ordering and maintaining inventory, maintaining records and performing other routine functions, rather than primarily supervising other employees or performing managerial duties. An employee will not be considered to be a supervisor simply because of a job title, because he or she is arbitrarily placed on an organizational chart in a position superior to another employee, or even because he or she supervises daily work activities and assignments. Rather, the employee must be shown to possess some

significant degree of control or authority over the employment of subordinates. *See generally Browne v. Signal Mountain Nursery, L.P.*, 286 F.Supp.2d 904, 907 (E.D. Tenn. 2003) (*Cited in Hayes v. Laroy Thomas, Inc.*, 2007 WL 128287 at *16 (E.D. Tex. Jan. 11, 2007)). Although the petitioner identified subordinate employees reporting to both the sales manager and purchase manager on the organizational chart, the petitioner's descriptions of their duties did not identify any supervisory functions, and the AAO cannot conclude that either employee is a supervisor or a manager.

Therefore, the totality of the record does not support a conclusion that the beneficiary's subordinates are supervisors, managers, or professionals. Instead, the record indicates that the beneficiary's subordinates perform the actual day-to-day tasks of operating the foreign entity's wholesale and retail business. The petitioner has not provided evidence of an organizational structure sufficient to elevate the beneficiary to a supervisory position that is higher than a first-line supervisor of non-professional employees.

The term "function manager" applies generally when a beneficiary does not supervise or control the work of a subordinate staff but instead is primarily responsible for managing an "essential function" within the organization. See section 101(a)(44)(A)(ii) of the Act, 8 U.S.C. § 1101(a)(44)(A)(ii). The term "essential function" is not defined by statute or regulation. If a petitioner claims that the beneficiary is managing an essential function, the petitioner must furnish a position description that identifies the duties to be performed in managing the essential function, i.e. identifies the function with specificity, articulates the essential nature of the function, and establishes the proportion of the beneficiary's daily duties attributed to managing the essential function. *See* 8 C.F.R. § 214.2(l)(3)(ii). In addition, the petitioner's description of the beneficiary's daily duties must demonstrate that the beneficiary manages the function rather than performs the duties related to the function.

The petitioner has not provided evidence that the beneficiary manages an essential function. Although the petitioner stated that the beneficiary will be responsible for "overall supervision of all functions of the business," the petitioner failed to identify the function(s) managed with specificity or clearly establish how much of the beneficiary's time is devoted to management duties. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).

Counsel correctly observes that a company's size alone, without taking into account the reasonable needs of the organization, may not be the determining factor in denying a visa to a multinational manager or executive. *See* § 101(a)(44)(C) of the Act, 8 U.S.C. § 1101(a)(44)(C). However, we stress that our determination is based not on the size of the foreign entity, but based on the petitioner's failure to provide a detailed description of the beneficiary's duties sufficient to establish that such duties are primarily managerial, and based on the petitioner's failure to support its claims that the beneficiary's subordinates are bona fide supervisors. The AAO has long interpreted the regulations and statute to prohibit discrimination against small or medium-size businesses. However, consistent with both the statute and relevant case law, the AAO has required petitioners to establish that the beneficiary's position consists of primarily managerial or executive

duties and that the petitioner will have sufficient personnel to relieve the beneficiary from performing operational, administrative and first-line supervisory tasks.

While the AAO is prepared to conclude that some of the beneficiary's tasks are qualifying, the petitioner has the burden of establishing that a majority of his tasks would be qualifying. This determination cannot be based on the beneficiary's management of subordinates or a job description that fails to describe the beneficiary's specific daily tasks. Again, the actual duties themselves reveal the true nature of the employment. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. at 1108 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d. Cir. 1990).

Based on the foregoing discussion, the petitioner has failed to establish that the beneficiary was employed by the foreign entity in a primarily managerial or executive capacity. Accordingly, the appeal will be dismissed.

The second issue addressed by the director is whether the petitioner established that the beneficiary would be employed by the U.S. entity in a primarily managerial or executive capacity within one year of the approval of the petition.

When a new business is established and commences operations, the regulations recognize that a designated manager or executive responsible for setting up operations will be engaged in a variety of activities not normally performed by employees at the executive or managerial level and that often the full range of managerial responsibility cannot be performed. In order to qualify for L-1 nonimmigrant classification during the first year of operations, the regulations require the petitioner to disclose the business plans and the size of the United States investment, and thereby establish that the proposed enterprise will support an executive or managerial position within one year of the approval of the petition. *See* 8 C.F.R. § 214.2(l)(3)(v)(C). This evidence should demonstrate a realistic expectation that the enterprise will succeed and rapidly expand as it moves away from the developmental stage to full operations, where there would be an actual need for a manager or executive who will primarily perform qualifying duties. The petitioner must also establish that the beneficiary will have managerial or executive authority over the new operation. *See* 8 C.F.R. § 214.2(l)(3)(v)(B).

The petitioner filed the Form I-129, Petition for a Nonimmigrant Worker on December 22, 2008. In a letter dated December 19, 2008, the petitioner stated that the beneficiary "will be meeting the heads of different departments regularly to ensure the smooth functioning of the day to day operations," and "is responsible for coordinating and overseeing the operations of [the company]." The petitioner stated that the beneficiary will allocate 100% of his time to performing the following duties:

- Correspond with offshore departments for carrying out the operations of the Company;
- Receiving the latest updates on the functioning of the different departments and resolving issues;
- Review Budgets, Financial Reports and other financial documents;.
- Keeping track of achieving the company's goals;

- Attend and preside over meetings and oversee the functioning and development of ongoing projects.
- Supervising and monitoring the project team and is responsible for hiring and firing employees.

The petitioner submitted a proposed organizational chart for the U.S. company which indicates that the beneficiary's direct subordinates would include a marketing supervisor, an operations manager and an accountant. The chart shows that the marketing supervisor would supervise two sales associates.

The petitioner also submitted a business plan for the U.S. company, which indicates that it intends to sell wooden craft items wholesale to various types of retailers. The petitioner's business plan, at section 6.1, includes a personnel plan, where the petitioner indicates that it will have the following staff members: manager, sales and purchase manager, two salespersons, a technician, and a part-time accountant. The business plan indicates that the petitioner intends to maintain this staffing structure for the first three years of operation, with \$81,900 in salaries to be paid during fiscal year 2009.

In the RFE issued on January 2, 2009, the director instructed the petitioner to submit the following evidence related to the beneficiary's proposed position and the establishment of the new office: (1) complete position descriptions for the beneficiary and all proposed positions in the United States, including the number of hours to be devoted to each employees' job duties on a weekly basis; (2) evidence to show how the U.S. company will grow to be of sufficient size to support a managerial or executive position within one year; and (3) an organizational chart identifying each position to be filled within the initial year of operations.

In response, the petitioner submitted the following description of the beneficiary's proposed duties:

- Manage the organization (20 hours per week)
- Supervise and coach the supervisory personnel (Operations, Marketing and Accountant); increase efficiency through improvements to each function as well as coordination and communication between support and business functions. (8 hours per week)
- Human resources management including hiring and firing of employees. (6 to 8 hours per week)
- Exercise discretionary control over day-to-day operations of the company as a whole (10 hours per week)
- Oversee financial management, planning, systems and controls (6 to 8 hours per week)
- Macro level client relationship management in conjunction with the marketing department (4 hours per week)

The petitioner stated that the U.S. company will employ an operations manager who will perform the following duties:

- Improve the operational processes and policies to enhance the company's revenue (12 hours per week)
- Supply chain analysis for current and future product lines (12 hours per week)
- Work with marketing department on procurement of contracts (8 hours per week)
- Support Manager with human resources duties as needed (8 hours per week)

The petitioner described the proposed position of marketing supervisor as follows:

- Train and supervise sales associates (6 hours per week)
- Create short term and long term client development goals and strategies (8 hours per week)
- Actively promote and sell products by organizing market into regions
- Travel and meet potential clients (10 hours per week)
- Create all print and electronic marketing materials for disbursement to existing and potential clients (6 hours per week)
- Represent the company at trade shows and other industry events (3 hours per week)

The petitioner indicated that the accountant will work 20 hours per week and be responsible for reconciliation and data entry for revenue collected, maintenance of accounts receivable, control and analysis of general ledger accounts, preparation of monthly financial statements, and payroll management. Finally, the petitioner indicated that the sales associate(s) will work 20 hours per week and will be responsible for meeting with clients for sales consultations, securing leads by cold calling and networking, and supporting the marketing supervisor in all marketing and sales functions as needed.

In a letter dated February 26, 2009, counsel for the petitioner stated that the petitioner's business plan establishes how the U.S. company will grow to support a managerial position within one year of commencing operations. Counsel emphasized that the company anticipates that it will hire employees and be divided into departments within three months, and that the managers of such departments will relieve the beneficiary from performing the day-to-day operations of the company. Counsel stated that the beneficiary will be free to carry out "higher management duties" such as "supervising the supervisory personnel, expanding business operations, carrying out general human resources responsibilities such as hiring and firing of new employees, and overall management of the business."

The director denied the petition, concluding that the petitioner failed to establish that the beneficiary would be employed in a primarily managerial or executive capacity within one year. The director acknowledged the petitioner's statements that it intends to employ a manager, an operations manager, a marketing supervisor, an accountant and a sales associate by the end of the first year of operations, but questioned how the company would require two managers and a supervisor to oversee just two subordinate personnel. The director stated that "identifying layers of supervision is not persuasive when it appears those layers were created, and are not likely to result in, verifiable supervision or management of functions or departments." The director further found that, based on the total intended staffing of the office, it is not evident that the beneficiary would be performing primarily managerial duties, or that he would be supervising subordinate managers, supervisors or professionals.

On appeal, counsel for the petitioner objects to the director's finding that the petitioner has created layers of employees for the purpose of the petition. Counsel asserts that the structure of the U.S. company will be similar to that of the parent company, divided into three departments with one supervisor each. Counsel notes that "if there is only one person in a department, that person will handle both supervisory functions and the day to day operations of the business."

Counsel further asserts that the petitioner has established that the beneficiary will serve as a bona fide manager pursuant to the statutory definition of "managerial capacity," and that he will function at a senior level within the organization's hierarchy. Counsel asserts that the beneficiary will manage five employees during the first year of operations, including three supervisors, as well as contractors and vendors. In addition, counsel notes that, by the end of the first year, the beneficiary will be seeking additional business locations, with responsibility for "the due diligence of mergers and acquisitions."

Counsel acknowledges that the petitioner will be a small company initially, but notes that there will be two full-time supervisors (the operations manager and marketing supervisor), as well as a part-time accountant who will eventually work full-time and supervise subordinate employees. Counsel cites *National Hand Tool Corp. v. Pasquarell*, 889 F.2d 1472, n.5 (5th Cir. 1989) and *Mars Jewelers, Inc. v. INS*, 702 F. Supp. 1570, 1573 (N.D. Ga. 1988), in support of her claim that the statute was not intended to limit managers or executives to persons who supervise a large number of persons or large enterprises.

Upon review, the petitioner in this matter has failed to establish how the United States operation will succeed and rapidly expand as it moves away from the developmental stage to full operations, where there would be an actual need for a manager or executive who will primarily perform qualifying duties. The petitioner has failed to sufficiently describe the beneficiary's proposed duties after the petitioner's first year in operation; has failed to consistently describe the nature, scope, organizational structure, and financial goals of the new office; and has failed to establish that a sufficient investment has been made in the United States operation, as required by 8 C.F.R. § 214.2(l)(3)(v)(C).

When examining the proposed executive or managerial capacity of the beneficiary, the AAO will look first to the petitioner's description of the proposed job duties. See 8 C.F.R. § 214.2(l)(3)(ii). The petitioner's description of the job duties must clearly describe the duties that will be performed by the beneficiary and indicate whether such duties will be either in an executive or managerial capacity. *Id.*

Similar to the position descriptions submitted for the beneficiary's foreign position, the beneficiary's proposed job duties are described in general and nonspecific terms, and provide little insight into what types of duties the beneficiary would primarily perform as manager of the company at the end of one year. For example, the petitioner stated that the beneficiary will be "responsible for coordinating and overseeing the operations," "ensure the smooth functioning of day-to-day operations," "keeping track of achieving the company's goals," "overseeing the functioning and development of ongoing projects," and "supervising and mentoring the project team." These general statements do not convey an understanding of what the beneficiary would be doing on a day-to-day basis. Again, specifics are clearly an important indication of whether a beneficiary's

duties are primarily executive or managerial in nature, otherwise meeting the definitions would simply be a matter of reiterating the regulations. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d. Cir. 1990).

In response to the director's request for a more detailed description of the beneficiary's duties, the petitioner submitted a description which included many of the same vague responsibilities, and added that the beneficiary would spend 20 hours per week to "manage the organization," and 10 hours per week to "exercise discretionary control over day to day operations of the company." The petitioner failed to identify any concrete tasks identified with either of these broad responsibilities, which would account for more than half of the beneficiary's time. Again, reciting the beneficiary's vague job responsibilities or broadly-cast business objectives is not sufficient; the regulations require a detailed description of the beneficiary's daily job duties. The petitioner has failed to provide any detail or explanation of the beneficiary's proposed activities in the course of his daily routine. The actual duties themselves will reveal the true nature of the employment. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. at 1108.

Thus, while it appears that the beneficiary would exercise the requisite level of authority over the U.S. company as its manager, the vague position descriptions provided fall significantly short of establishing that the beneficiary's primary duties would be managerial or executive in nature. The beneficiary's primary duties have not been explained or defined beyond mere generalities. A beneficiary's "control," management or direction over a company cannot be assumed or considered "inherent" to his position merely on the basis of broadly-cast job responsibilities.

Likewise, the record is not persuasive in establishing that the beneficiary will be, after the first year, relieved of the need to perform the non-qualifying tasks inherent to his duties and to the operation of the business in general. The regulation at 8 C.F.R. § 214.2(l)(3)(v)(C)(I) requires the petitioner to provide evidence regarding the proposed nature of the business describing the scope of the entity, its organizational structure, and its financial goals. The petitioner must also establish that there is a realistic expectation that sufficient staff will be hired within one year to relieve the beneficiary from performing the non-qualifying duties associated with operating a wholesale business.

The petitioner has submitted a detailed business plan outlining its plans for its proposed wholesale operation. However, the "personnel plan" summarized in the business plan differs from the proposed structure depicted in the petitioner's proposed organizational chart and employee list. According to the business plan, the petitioner intends to hire a sales and purchase manager, two salespeople, a technician, and a part-time accountant during the first year of operations, while the organizational charts depict an operations manager, a marketing supervisor, two salespeople and an accountant. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). The AAO cannot determine which personnel plan represents the petitioner's actual anticipated organizational structure.

Furthermore, the petitioner's plan indicates that the petitioner intends to be fully staffed and paying salaries of \$9,100 per month as of December 2008. Given that the petition was filed on December 22, 2008, this hiring plan does not appear to be realistic. There is nothing in the record to suggest that the company is prepared to commence business operations immediately upon approval of the petition. For example, the petitioner did not have a federal employer identification number as of the date of filing, nor has it purchased any inventory. In addition, there is no evidence that the petitioner has set up a bank account or received any financial investment from its claimed parent company. In light of the two different personnel plans included in the record, and the lack of a realistic timeline for hiring additional staff, the petitioner has not supported its claim that the beneficiary would be supervising two or more subordinate supervisors within one year.

Even if the AAO accepted the anticipated structure indicated in the petitioner's organizational chart as the petitioner's likely structure after one year in operation, it is noted that a wholesale business with three "managers" and only one or two salespeople would likely require its managers to regularly perform non-qualifying duties related to the day-to-day operations of the business, rather than performing primarily managerial or executive duties. In addition, notwithstanding the job title assigned to the "operations manager," the petitioner does not indicate that this position would supervise any subordinate workers. Furthermore, while the petitioner's business plan indicates that the company would hire a sales and purchase manager, the petitioner's descriptions of the duties to be performed by the proposed employees do not identify any workers who would be responsible for sourcing and purchasing the products that the petitioner intends to sell to customers. As such, the petitioner has not sufficiently accounted for who on its staff would be performing these essential day-to-day non-managerial duties. Overall, the record does not present a clear picture of how the routine functions of the company will be distributed at the end of one year and is insufficient to support a finding that it will support the claimed three-tier structure.

Counsel cites *National Hand Tool Corp. v. Pasquarell*, 889 F.2d 1472, n.5 (5th Cir. 1989), and *Mars Jewelers, Inc. v. INS*, 702 F.Supp. 1570, 1573 (N.D. Ga. 1988), to stand for the proposition that the small size of a petitioner will not, by itself, undermine a finding that a beneficiary will act in a primarily managerial or executive capacity. First, the AAO notes that counsel has furnished no evidence to establish that the facts of the instant petition are analogous to those in *National Hand Tool Corp.*, where the Fifth Circuit Court of Appeals decided in favor of the legacy Immigration and Naturalization Service (INS), or *Mars Jewelers, Inc.*, where the district court found in favor of the plaintiff. With respect to *Mars Jewelers*, the AAO is not bound to follow the published decision of a United States district court in matters arising within the same district. See *Matter of K-S-*, 20 I&N Dec. 715 (BIA 1993). Although the reasoning underlying a district judge's decision will be given due consideration when it is properly before the AAO, the analysis does not have to be followed as a matter of law. *Id.* at 719.

In both *National Hand Tool Corp.* and *Mars Jewelers, Inc.*, the courts emphasized that the former INS should not place undue emphasis on the size of a petitioner's business operations in its review of an alien's claimed managerial or executive capacity. The AAO has long interpreted the regulations and statute to prohibit discrimination against small or medium-size businesses. However, consistent with both the statute and the holding of *National Hand Tool Corp.*, the AAO has required the petitioner to establish that the beneficiary's

position consists of primarily managerial or executive duties and that the petitioner will have sufficient personnel to relieve the beneficiary from performing operational and/or administrative tasks. Like the court in *National Hand Tool Corp.*, we emphasize that our holding is based on the conclusion that the petitioner failed to establish that the beneficiary will be primarily performing managerial duties within one year, due to the deficiencies discussed above; our decision does not rest on the proposed size of the petitioning entity. 889 F.2d at 1472, n.5.

Finally, the petitioner failed to establish that the United States operation will support an executive or managerial position within one year because it failed to provide information regarding the size of the U.S. investment and financial ability to commence doing business in the United States. 8 C.F.R. § 214.2(l)(3)(v)(C)(2). The petitioner has not clearly established the amount or the source of the funding for the company's start-up costs. The "executive summary" in the petitioner's business plan indicates that the company projects start-up costs of \$15,000 to be provided by the beneficiary. The "start-up summary" in the petitioner's business plan indicates that the total start-up funding required will be \$130,050, including \$52,250 in expenses and \$77,800 in cash and other assets. The business plan indicates a planned investment in the amount of \$17,000 to be provided by the beneficiary and lists an "additional investment requirement" in the amount of \$113,050. The petitioner has not disclosed the balance of the U.S. or foreign entity's bank accounts or provided any other evidence pertaining to the investment in the U.S. company. Based on this minimal and conflicting evidence, the petitioner has not established that it has obtained or will be able to obtain the funds needed to cover its start-up costs, which further undermines the petitioner's claim that the company will achieve its financial objectives and proposed staffing levels for the first year of operations.

Based on the foregoing discussion, the petitioner has failed to establish that the United States operation will support an executive or managerial position within one year as required by 8 C.F.R. § 214.2(l)(3)(v)(C), and the petition may not be approved for that reason.

The petition will be denied and the appeal dismissed for the above stated reasons, with each considered as an independent and alternative basis for the decision. When the AAO denies a petition on multiple alternative grounds, a plaintiff can succeed on a challenge only if it is shown that the AAO abused its discretion with respect to all of the AAO's enumerated grounds. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d at 1043.

In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

ORDER: The appeal is dismissed.